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Quarterly Synopsis of Florida Cases

QUARTERLY SYNOPSIS OF FLORIDA CASES*

The Florida Supreme Court decided about one hundred cases during the period reported from February 7, 1952 through April 24, 1952. Those opinions (excluding memorandum decisions and a few others not considered of sufficient importance to be noted here) found in 55 So.2d 873 to 57 So.2d 736 are herewith reported. In addition five federal cases interpretive of Florida law are included. These were taken from 72 Sup. Ct. 380 to 72 Sup. Ct. 678 (advance sheets from March 15, 1952 to May 1, 1952); 193 F.2d 209 to 195 F.2d 184 (advance sheets from Feb. 18, 1952 to May 5, 1952); and 101 F. Supp. 765 to 103 F. Supp. 577 (advance sheets from February 25, 1952 to May 5, 1952).

ADMINISTRATIVE LAW. *Findings of Railroad and Public Utilities Commission.* The court will not set aside the findings and conclusions of the Railroad and Public Utilities Commission merely because, on review of the record, the court might have reached a different conclusion from the evidence. The test is if there was substantial competent evidence legally sufficient to justify the order challenged.[1]

Supervisors of the State Beverage Department. In the absence of vested power or authority in the supervisors of the State Beverage Department which would indicate legislative intent that they are to be officers of the State, they are deemed to be employees. Such being the case, they may be discharged by the Director of the State Beverage Department without any action by the Governor.[2]

ARREST. *Without warrant.* "A mission to check on a pair of drunks is not so urgent as to relieve a deputy sheriff from arming himself with a warrant when he proceeds to one's home to make an arrest."[3]

CARRIERS. *Certificate of convenience and necessity.* A motor carrier holding a certificate of convenience and necessity from the Interstate Commerce Commission for the purpose of delivering movie film to theaters petitioned the Florida Railroad and Public Utilities Commission for an additional certificate to enable him to deliver candy, popcorn, sanitary supplies and other theatrical accessories to the same theaters. The Commission refused the certificate on the ground that it was not in the public interest.

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1. Benton Bros. Film Exp., Inc. v. Florida R.R. & Pub. Util. Comm'n, 57 So.2d 435 (Fla. 1952).
2. Schott v. Lynch, 57 So.2d 656 (Fla. 1952).
3. FLA. STAT. § 901.15 (1949), Alday v. State, 57 So.2d 333 (Fla. 1952).

The court pointed out that the petition amounted to a request for permission to improve and extend an already existing service without increasing the burden on Florida highways rather than a request for a certificate for a new service. The order of the Commission was quashed with directions to enter an appropriate order of extension of the certificate.[4]

The Florida Railroad & Public Utilities Commission does not have the power to include in a certificate of public convenience and necessity, issued to a railroad under statute,[5] restrictions not enumerated by the statute.[6]

Responsibility for box cars belonging to other carriers. "When a railroad company takes over a box car from another carrier, it takes it as part of its own equipment and assumes responsibility for its condition."[7]

CONFLICT OF LAWS. *Foreign decrees: Full faith and credit.* As to matters actually litigated, the valid decree of a foreign country will be given full faith and credit. It can be overcome only if the moving party can show new conditions that have arisen or old facts that were not revealed or considered by the foreign court.[8]

CONSTITUTIONAL LAW. *Due process.* A city ordinance providing for the punishment of a city official by fine or imprisonment if found guilty of disobediance by a two-thirds vote of the city council strongly resembles a bill of attainder. Its operation constitutes a denial of due process and is invalid.[9]

Separation of church and state. The corpus of a charitable trust consisted of property, buildings and equipment, including a chapel located in one of the buildings. All of this property with the exception of the chapel was to be turned over to the county board of public instruction under the *cy pres* doctrine. Sufficient funds of the trust were to be retained to operate and maintain the chapel. Such operation and maintenance is not in violation of the constitutional requirement of separation of church and state.[10]

State School Fund. The State School Fund described in the Constitution does not refer to land owned by the State Board of Education but to the proceeds derived from the land. Therefore, this land is not included in the provision that "the principal of the State School Fund shall remain sacred and inviolate."[11]

CONTRACTS. *Alterations in construction contract.* The law implies an

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4. Benton Bros. Film Exp., Inc. v. Florida R.R. & Pub. Util. Comm'n, 57 So.2d 435 (Fla. 1952).
5. FLA. STAT. § 323.26 (1949).
6. Atlantic Coast Line R.R. v. Mack, 57 So.2d 447 (Fla. 1952).
7. Atlantic Coast Line R.R. v. Gary, 57 So.2d 10 (Fla. 1952).
8. Willson v. Willson, 55 So.2d 905 (Fla. 1951).
9. Jones v. Slick, 56 So.2d 459 (Fla. 1952).
10. U.S. CONST. AMEND. 1, FLA. CONST. Decl. of Rights § 6, Fenske v. Coddington, 57 So.2d 452 (Fla. 1952).
11. FLA. CONST. Art. XII, § 4, State *ex rel.* Board of Sup'rs of So. Fla. Conservancy Dist. v. Warren, 57 So.2d 337 (Fla. 1952).

obligation on the part of a party to a building contract to pay for requested alterations or "extras" not considered in the original contract.[12]

Damages arising from misrepresentation of injured party. An agreement under which a county was to move a building from a proposed roadway does not place it under liability for damage to the structure in moving when the owner misrepresented the type of construction and later refused offers of the moving contractor to make repairs.[13]

Employment. Participation by an employee in a group annuity plan providing for cancellation does not give rise to an implied contract of employment terminable only for substantial cause when the employee requests and receives a refund of payments and signs a release to the insurer.[14]

Parol evidence. The defendant personally guaranteed the account of a named company, covering "all materials purchased" from plaintiff by that company. The word "purchased" is sufficiently ambiguous to permit parol evidence to explain whether the intent was to include only materials already purchased, or whether it was to include materials to be purchased in the future as well.[15]

CORPORATIONS. *Instrument executed without corporate seal.* It is well settled law in Florida that a signature by the appropriate officer of a corporation accompanied by the typewritten word "seal" is effective to execute an instrument under seal even though the corporate seal is not affixed.[16]

COURTS. *Creation of criminal court of record.* The legislature may create a criminal court of record without first requiring the application of a majority of the registered voters in the county in which the court is created.[17]

Power of legislature to abolish. Under the Florida Constitution the legislature can abolish a court in a single named county only by a special act regardless of whether the court was established by a special or a general act.[18]

CRIMINAL LAW. *Conviction based on suspicious circumstances.* "... it takes something more than proof of suspicious circumstances to sustain a conviction for crime."[19]

Conviction of accessory prior to sentencing of principal. An accessory to a crime may be convicted if the principal to the crime has been found guilty even though the principal's sentencing has been deferred.[20]

Conviction of parolee followed by revocation of conditional pardon.

12. De Lotte v. Fennell, 56 So.2d 518 (Fla. 1951).
13. Smith v. Manatee County, 56 So.2d 453 (Fla. 1952).
14. Gelhaus v. Eastern Air Lines, Inc., 194 F.2d 772 (5th Cir. 1952).
15. Friedman v. Virginia Metal Products Corp., 56 So.2d 515 (Fla. 1952).
16. Sarasota Kennel Club, Inc. v. Shea, 56 So.2d 505 (Fla. 1952); Campbell v. McLaurin Investment Co., 74 Fla. 501, 77 So. 277 (1917).
17. FLA. CONST. Art. V, §§ 1, 24, Hanson v. State, 56 So.2d 129 (Fla. 1952).
18. FLA. CONST. Art. III, §§ 20, 21, Art. V, § 1, State *ex rel.* Ervin v. Barnes, 56 So.2d 506 (Fla. 1952).
19. Lombardo v. State, 55 So.2d 914 (Fla. 1951).
20. FLA. STAT. § 776.02 (1949), Weathers v. State, 56 So.2d 536 (Fla. 1952).

While on a conditional pardon after serving part of a fifteen year sentence a parolee was convicted of a felony and sentenced to serve five years. The pardon board then revoked his pardon. The court held that the sentences ran concurrently even though the trial judge failed to so state. The prisoner does not lose his gain time earned before conviction of the second felony.[21]

Homicide. If the evidence discloses that the deceased was a purported deputy sheriff, without benefit of proper election or appointment, and that he was killed while searching the accused's home in the middle of the night without a warrant, a verdict greater than manslaughter is not justified.[22]

Manslaughter. A person subjected to an unlawful attempt to arrest him in his own home may resist with so much force as is reasonable to effect his escape. If, in the heat of passion and in the absence of premeditation the person so resisting uses more force than is necessary and kills the arresting officer, the offense is manslaughter.[23]

Revocation of parole. A parolee who has his conditional pardon revoked and allows ten years to pass before asking for a hearing on the revoation order will be deemed to have waived his right to a hearing.[24]

DAMAGES. *Destruction by fire.* The measure of damages to be used when a chattel is completely destroyed by fire is the value of the chattel at the time of the fire.[25]

Goods lost in hands of receiver. Plaintiff had a contract with defendant for the purchase of fruit on the defendant's trees. The defendant wrongfully refused to allow plaintiff to pick the fruit. Because of the perishable nature of the fruit a receiver pendente lite was appointed. While the fruit was in the hands of the receiver it was partially destroyed by freezing weather. It was found that the plaintiff was the owner of the fruit. The court recognized the rule that the owner of goods in the hands of a receiver must suffer any losses incurred but found the rule inapplicable here. Because the defendant's wrongful act necessitated the receivership it was held that the measure of damages is the value of the goods at the time of the wrongful act.[26]

Punitive damages. A proper element to be considered in assessing punitive damages is the amount which would operate as a punishment of the defendant with respect to his financial condition.[27]

Wrongful death. "The widow's claim for damages for the death of her husband by the wrongful act of another is based on the following elements: (1) Her loss of the comfort, protection, and society of the husband in the

21. FLA. STAT. §§ 921.16, 954.06 (1949), Mayo v. State *ex rel.* Cox, 56 So.2d 547 (Fla. 1952).
22. Timmons v. State, 57 So.2d 36 (Fla. 1952).
23. Alday v. State, 57 So.2d 333 (Fla. 1952).
24. Chastain v. Mayo, 56 So.2d 540 (Fla. 1952).
25. First. Nat. Bank in Tarpon Springs v. Bliss, 56 So.2d 922 (Fla. 1952).
26. Fowler v. Smoak, 57 So.2d 429 (Fla. 1952).
27. Maiborne v. Kuntz, 56 So.2d 720 (Fla. 1952).

light of all the evidence relating to the character, habits, and conduct of the husband as such. (2) The marital relations between the parties at the time of and prior to his death. (3) His services, if any, in assisting her in the care of the family. (4) The loss of support which the husband is legally bound to give the wife, and which is based on his probable future earnings and other acquisitions. (5) The station in society which his past history indicates that he would probably have occupied and his reasonable expectations in the future, such earnings and acquisitions to be estimated upon the basis of deceased's age, health, business capacity, habits, experience, and energy, and his present and future prospects for business success at the time of his death—all of these elements to be based upon the probable joint lives of the widow and husband. (6) She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate in case her life expectancy be greater than his—the sum total of all these elements to be reduced to a money value, and its present worth to be given as damages."[28]

DECLARATORY JUDGMENTS. *Case or controversy.* It is the function of a circuit court to adjudicate the constitutionality of a statute in a declaratory judgment proceeding brought by a citizen. There need not be a case or controversy if the movant shows that he is in doubt as to the existence or non-existence of some right, status, immunity, power or privilege, which doubt he is entitled to have removed.[29]

DIVORCE. *Bill to set aside decree.* A bill in the nature of a bill of review was filed to set aside a divorce allegedly obtained by the husband's fraud and duplicity. The court held that the suit could not be maintained after the wife had enjoyed the benefits of the property settlement for three years.[30]

Custody of children. A divorce decree granted permanent custody of children to the mother with reasonable visitation privilege to the father. A subsequent order giving the father the right to have the children visit his out-of-state home for two months in the summer and requiring the mother to pay their return fare and relinquish the support money during that time was held improper, being in effect an order for divided custody without showing of a change of circumstances since the original decree.[31]

Foreign divorce not res judicata as to right to Florida divorce. A wife obtained a Virginia divorce *a mensa et thoro* on the ground of desertion. The husband established residence in Florida and sued for a divorce grounded on extreme cruelty and ungovernable temper. The court held that the Virginia divorce was not res judicata of the husband's right to a Florida divorce on issues not considered in the Virginia proceeding, but that the

28. Seaboard Air Line R.R. v. Martin, 56 So.2d 509 (Fla. 1952).
29. Rosenhouse v. 1950 Spring Term Grand Jury, 56 So.2d 445 (Fla. 1952).
30. Jordan v. Jordan, 57 So.2d 581 (Fla. 1952).
31. Kelley v. Kelley, 56 So.2d 439 (Fla. 1952).

court should retain jurisdiction for the purpose of enforcing the Virginia decree as to support money should it become necessary.[32]

Grounds: Extreme cruelty. A wife, who was considerably younger than her husband, brought her ex-husband into their home as a guest. She lodged the ex-spouse in a bedroom which connected with her own by a door without a lock. She denied her husband the right to enter her bedroom without permission. Said the court, "This, in my opinion, is the worst form of extreme cruelty that could have been practiced upon the Plaintiff by the Defendant."[33]

Grounds: Habitual intemperance. In reversing a divorce decree the court pointed out that a husband should not complain of the habitual intemperance of his wife if he kept their home well stocked with liquor and frequently joined her in excessive drinking.[34]

DOMICILE. *Intent.* The intent to establish a domicile must be a present intent rather than an intent to establish a home in the future. The fact that the party was in military service at the time he attempted to establish residence in Florida and was unable to do so because of the call of duty does not alter the rule.[35]

ELECTIONS. *Selection of committeemen and delegates to national convention.* National committeemen, committeewomen and delegates to a national convention are party officers and not state officers. Their selection is a party matter unless controlled or regulated by statute and the courts have no right, power or authority to exercise any control over the discretion vested in the state executive committee by statute.[36]

EMINENT DOMAIN. *Taking before judicial evaluation.* Property may be taken by eminent domain proceedings prior to a jury determination of its value under a statute[37] which provides for a deposit of twice the appraised value with the court, said appraisal being based on testimony of the parties and a report of the appraisers.[38]

EQUITY. *Adequate remedy at law.* In a proceeding for an accounting, if the record discloses that the actual relationship of the parties is that of debtor and creditor rather than of parties to a joint venture the bill should be dismissed or transferred to the law side of court.[39]

Allegations for equitable lien. A bill for an equitable lien must contain either an allegation of insolvency or an allegation of an inadequate remedy

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32. Mellot v. Mellot, 57 So.2d 4 (Fla. 1952).

33. Golembeski v. Golembeski, 57 So.2d 654 (Fla. 1952).

34. Todd v. Todd, 56 So.2d 441 (Fla. 1952).

35. Campbell v. Campbell, 57 So.2d 34 (Fla. 1952).

36. FLA. STAT. §§ 103.101(7), 103.121(7) (1949), Alexander v. Booth, 56 So.2d 717 (Fla. 1952).

37. FLA. STAT. c. 74 (1949).

38. FLA. CONST. Decl. of Rights § 12, Art. XVI, § 29, State Road Dept v. Forehand, 56 So.2d 901 (Fla. 1952).

39. Manning v. Clark, 56 So.2d 521 (Fla. 1951).

at law, but a bill deficient in such allegations should not be dismissed without leave to amend.[40]

Hearing on bill and answer. In a hearing on bill and answer, after the time for taking testimony has expired, every answer which is responsive to an allegation in the bill is taken as true. If the answer denies all of the material allegations of the bill, the issues are made by the denials and a final decree should be entered against the party having the burden of proof.[41]

Laches. The father-daughter relationship coupled with a showing of an inharmonious relationship with the girl's stepmother is sufficient justification for a daughter's failure to demand or seek a decree for specific performance of a contract during her father's life. The defenses of laches or equitable estoppel may not be raised against her when she seeks specific performance from her deceased father's corporation.[42]

Satisfaction of mortgage. If a trial court erroneously fails to order a satisfaction of a mortgage after it has been established that the notes for which the mortgage was given are paid, the mortgagor has a right to complain of the error on appeal even though the satisfaction of mortgage was made subsequent to the entry of a final decree.[43]

Settlement of judgment lien in partition proceedings. In a proceeding to partition property among sole heirs at law, an equity court can give complete relief by settling the matter of a judgment lien which one of the heirs had against another heir and which would attach after partition. Then if it is necessary to sell the property under the decree of the court, the purchaser may obtain title free and clear of the lien.[44]

Suit to quiet title on tax deed. If the purchaser of a tax deed allows a party who was in possession at the time the deed was issued to remain in possession without bringing an action until four years after the date of the deed, the purchaser is not entitled to have the title quieted in him as against the party in possession.[45]

EVIDENCE. *Admissibility of unsigned letter.* An unsigned letter may be received in evidence if properly connected with a person as being his actual letter by the introduction of competent evidence showing it to be so.[46]

Manslaughter. Proof that a defendant was speeding at the time of an auto accident, without other evidence, is not sufficient to establish the culpable negligence requisite for a charge of manslaughter.[47]

Testimony of handwriting expert. Testimony of handwriting experts

40. Lewinson v. Shaw, 56 So.2d 449 (Fla. 1952).
41. Starlight Corp. v. Miami Beach, 57 So.2d 6 (Fla. 1952).
42. Cottages, Miami Beach, Inc. v. Wegman, 57 So.2d 439 (Fla. 1952).
43. Gordon v. Citizens & So. Nat. Bank of Atlanta, 56 So.2d 531 (Fla. 1952).
44. Burney v. Dedge, 56 So.2d 715 (Fla. 1952).
45. Deas v. Turner, 56 So.2d 337 (Fla. 1952).
46. Silva v. Exchange Nat. Bank of Tampa, 56 So.2d 33 (Fla. 1952) (reported as 54 So.2d 370 and subsequently withdrawn by order of the court).
47. Preston v. State, 56 So.2d 543 (Fla. 1952).

alone is sufficient to establish forgery of a will and can properly prevail over inconsistent and contradictory evidence.[48]

EXTRADITION. *Unauthenticated affidavits.* If affidavits attached to an extradition warrant are not authenticated by the governor of the state requesting extradition the warrant is fatally defective.[49]

FAMILY LAW. *Release for adoption.* A letter from the unmarried mother to the adoptive parents requesting them to come for her child coupled with its delivery to them is sufficient to satisfy the formal requisites for a release from the mother.[50]

A formally executed consent agreement by an unmarried expectant mother for the adoption of her unborn child satisfied the statute[51] although she used an assumed name to preserve her anonymity, where her conduct after the child's birth indicated a ratification of the document.[52]

FRAUD. *Delay in assertion.* " . . . a party injured by fraud must assert his remedial rights without delay upon becoming aware of the fraud and after he obtains knowledge of the fraud or has become informed of facts from which such knowledge would be imputed to him a delay in asserting his rights constitutes a bar to equitable relief."[53]

Misrepresentation of credit rating of third party. One who fraudulently misrepresents to another the financial condition of a third party for the purpose of inducing him to extend credit to the third party is liable for losses resulting from the extension of credit in reliance on the misrepresentation.[54]

Misrepresentation to commercial credit rating company. One who gives false information as to his solvency to a commercial credit rating company is responsible to a person who relied on the misrepresentations to his detriment as though he had made them directly.[55]

Rescission of contract. A contract may not be rescinded for fraud if the party defrauded appears to have waived the fraud after learning the true facts and subsequently uses the fraud as a guise for seeking recission when in fact his real motivation was dissatisfaction with the bargain.[56]

Proven by series of acts. "Frauds may be proven by showing a series of distinct acts, each of which may be a badge of fraud and when taken together as a whole constitute fraud."[57]

GAMING. *Circumstantial Evidence.* "Everyone who, like the author [Hobson, J.], was reared and has lived all of his life in the milieu of the deep south has a complete understanding of the reactions to arrest of an

48. Mauldin v. Reel, 56 So.2d 918 (Fla. 1952); Hilton, *Forged Wills Revealed by Scientific Examination of Documents, supra* p. 560.
49. FLA. STAT. § 941.03 (1949), Hattaway v. Culbreath, 57 So.2d 661 (Fla. 1952).
50. FLA. STAT. § 72.14 (1949), Pugh v. Barwick, 56 So.2d 124 (Fla. 1952).
51. FLA. STAT. § 72.14 (1949).
52. *In re* Adoption of Long, 56 So.2d 450 (Fla. 1952).
53. McCormick v. Lewis, 102 F. Supp. 624 (N.D. Fla. 1952).
54. Forbes v. Auerbach, 56 So.2d 895 (Fla. 1952).
55. *Ibid.*
56. Nam Han, Inc. v. Yedlin, 56 So.2d 133 (Fla. 1952).
57. Allen v. Tatham, 56 So.2d 337 (Fla. 1952).

unlettered Negro . . . . His 'twisting around,' the fact that he was 'trying to get into his shirt' and that he evidenced a desire to go to the lavatory, where it might be *assumed* that he wished to dispose of the lottery tickets, are all normal reactions of a nescient Negro when he finds himself in the arms of 'the law.'" Such circumstantial evidence is not sufficient to sustain the verdict because it does not exclude every reasonable hypothesis except that of the defendant's guilt.[58]

Lottery. Evidence that the defendant was temporarily in charge of the bar in which lottery tickets were found is not sufficient to sustain his conviction for unlawful possession of lottery tickets.[59]

Conspiring to conduct and maintain a lottery is a misdemeanor, not a felony. One convicted of this crime should be fined or sentenced to imprisonment in the county jail and a sentence to the state prison is erroneous.[60]

HIGHWAYS. *Intersections.* A rock fill area contiguous to a highway, which connects the pavement with a private road, is not an intersection within the meaning of the statute prohibiting one motor vehicle from passing another on the left within 100 feet of an intersection.[61]

INSURANCE. *As security.* Decedent assigned the proceeds from certain insurance policies to a bank as security for any and all of his liabilities arising in the ordinary course of business. He became liable to the bank on his own personal notes, as surety on other notes and on checks upon which his name did not appear individually but the proceeds of which he received directly from the bank. The court held that the bank was entitled to deduct the amounts of all of the notes and checks before paying the balance to the decedent's widow.[62]

Attorney's fees. An insurance contract was entered into in a state which had no provision for allowing attorney's fees to a beneficiary bringing suit on his policy. The insured subsequently moved to Florida and incurred a disability that made the insurer liable. The insurer is a foreign corporation licensed in Florida. In a suit to recover the benefits of the policy the insured was also allowed his attorney's fees as provided by Florida statute.[63] In a per curiam decision, with three justices dissenting, the court held that the Florida statute was a procedural one which added no incidents to the contract. "Notwithstanding the fact that where an insurance policy is a Florida contract, the statute, section 625.08, may be a part of the contract and, therefore, create a substantive right in the beneficiary, such fact does not prohibit or prevent such provision of the statute also from being a vital

58. Dixon v. State, 56 So.2d 331 (Fla. 1952).
59. FLA. STAT. § 849.09 (1949), Broadnax v. State, 57 So.2d 651 (Fla. 1952).
60. Shuler v. State, 57 So.2d 336 (Fla. 1952).
61. FLA. STAT. § 317.30 (1949), Osborne v. Lee, 57 So.2d 652 (Fla. 1952).
62. Silva v. Exchange Nat. Bank of Tampa, 56 So.2d 332 (Fla. 1952) (reported as 54 So.2d 370 and subsequently withdrawn by order of the court).
63. FLA. STAT. § 625.08 (1949).

procedural one in the Courts of the State of Florida in any suit upon an insurance policy where the beneficiary is successful."[64]

Breach of financing arrangement. An insurer held out a solicitor of insurance as its agent. The insurer credited unearned premiums to its general agent who in turn paid the funds over to the insurance solicitor instead of to the bank entitled to the funds under a policy financing arrangement. The insurer was held liable to the bank for losses due to its failure to remit the funds directly to the bank. It was also held that the bank was not a beneficiary under the meaning of the statute[65] allowing attorney's fees to beneficiaries sueing for the proceeds of insurance policies.[66]

Change of beneficiary. Insurance policy requirements for a change of beneficiary in an ordinary life insurance policy issued to individuals are strictly interpreted in Florida. In the absence of a reported Florida decision directly on point it was held that the rule does not necessarily apply to a group life insurance policy which requires nothing more of the insured than that he notify his employer's home office of a change of beneficiary.[67]

JURIES. *Improper communication with juror.* An offer to divulge information pertaining to the suit under consideration made to a juror by one not a party to a suit is not a basis for a mistrial when the communication contained no information upon which the juror could predicate a verdict.[68]

LANDLORD AND TENANT. *Implied covenant of quiet enjoyment.* Unless a lease contains an express covenant to the contrary the law will imply a covenant of peaceable and quiet enjoyment. Should the landlord maintain a nuisance on adjoining property he will be answerable in damages.[69]

LEGISLATION. *Act effective upon happening of contingency.* The legislature may enact a law complete in itself and provide that it shall go into effect upon the happening of a contingency, such as the affirmative vote in an election provided for in the act.[70]

LIBEL AND SLANDER. *Necessary proof.* It is essential to prove unprivileged publication of slanderous remarks to recover damages for slander.[71]

MORTGAGES. *Effect of Divorce.* A purchase money mortgage taken by a husband and wife as mortgagees creates an estate by the entireties which

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64. Feller v. Equitable Life Assur. Soc. of the United States, 57 So.2d 581 (Fla. 1952). The dissenting opinion pointed out that the majority opinion was opposed to a ruling of the Supreme Court of the United States [Aetna Life Insurance Company v. Dunken, 266 U.S. 389 (1924)]and that the instant case was a violation of the "full faith and credit" clause of the United States Constitution.

65. FLA. STAT. § 625.08 (1949).

66. Industrial Ins. Co. of N.J. v. First Nat. Bank of Miami, 57 So.2d 23 (Fla. 1952).

67. Travelers Ins. Co. v. Davis, 102 F. Supp. 5 (S.D. Fla. 1952) (notice of the desired change of beneficiary reached the home office of the employer on the same day the insured died).

68. First Nat. Bank in Tarpon Springs v. Bliss, 56 So.2d 922 (Fla. 1952).

69. McClosky v. Martin, 56 So.2d 917 (Fla. 1952).

70. Gillette v. Tampa, 57 So.2d 27 (Fla. 1952).

71. Gelhaus v. Eastern Air Lines, Inc., 194 F.2d 774 (5th Cir. 1952).

becomes an estate in common upon their divorce if not otherwise disposed of by the divorce decree.[72]

Foreclosure: Deficiency decree. Granting foreclosure of a chattel mortgage without passing on the prayer for a deficiency judgment does not preclude the mortgagee from maintaining an action at law on the note to recover the deficiency.[73]

MUNICIPAL CORPORATIONS. *Annexation proceedings.* Legislative determination that an area authorized to be annexed is a logical extension of the boundaries of a city and amenable to municipal benefits cannot be upheld if it constitutes a palpably arbitrary, unnecessary and flagrant invasion of personal and property rights. The burden of establishing this rests upon those resisting the annexation since there is a presumption in favor of the reasonableness of the extension of the city boundaries. It is no answer to an annexation proceeding to say that individual residents of the rural area do not desire it if it is in the best interests of the community in which they own property.[74]

Authority of mayor to suspend city manager. Repeated suspensions of a city manager by a mayor solely because he believes that there should be no such office are invalid.[75]

Competition with private business. Authority granted a municipal corporation to own an auditorium carries with it implied authority to operate it in behalf of the public interest or economic welfare of the city, even though such operation might compete with private business.[76]

Jurisdiction. Evidence which shows that the land in question is an island unconnected by bridge with the city and that the island had received no municipal benefits is sufficient to divest the city of its jurisdiction over the land.[77]

Right of taxpayer to enjoin illegal acts. A taxpayer cannot sue to enjoin an illegal or unauthorized act of a municipal corporation unless such act will result in an increase of his taxes or will otherwise result in direct or indirect pecuniary harm. Thus, where it appears that the necessary funds to cover costs of a special election have already been collected the taxpayer may not enjoin the election.[78]

NEGLIGENCE. *Assumption of risk.* A tenant, who was fully aware of the slippery condition existing on one of the building's two stairways in rainy

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72. Powell v. Metz, 55 So.2d 915 (Fla. 1952).

73. FLA. STAT. 702.06 (1949), McLarty v. Foremost Dairies, Inc., 57 So.2d 434 (Fla. 1952).

74. Gillette v. Tampa, 57 So.2d 27 (Fla. 1952).

75. Jones v. Slick, 56 So.2d 459 (Fla. 1952).

76. Starlight Corp. v. Miami Beach, 57 So.2d 6 (Fla. 1952).

77. Miami Beach v. State *ex rel.* Wood, 56 So.2d 520 (Fla. 1952).

78. Bryan v. Miami, 56 So.2d 924 (Fla. 1952).

weather, assumed the risk of injury by using the wet stairway and cannot recover for injuries sustained thereby.[79]

Contributory negligence. A caddy on a golf course who is struck by a ball driven by a player that he knew or had reason to know was an erratic golfer might be guilty of contributory negligence in failing to be on the lookout for a wild drive if he knew the golfer was nearby. Failure to instruct on contributory negligence in such a case is reversible error.[80]

Contributory negligence is a question of fact for the jury and when the evidence shows nothing more than that the plaintiff had knowledge of the existence of danger, the question of contributory negligence should not be taken from the jury.[81]

Last-clear-chance. The last-clear-chance doctrine does not permit one to recover in spite of his contributory negligence, but merely operates to relieve the negligenc of the plaintiff in a particular instance which would otherwise be regarded as contributory by its nature. This is accomplished by characterizing the negligence of the defendant, if it intervenes between the negligence of the plaintiff and the accident, as the sole proximate cause of the injury. The plaintiff's antecedant negligence is then regarded as merely a condition or as a remote cause.[82]

Res ipsa loquitur. The doctrine of *res ipsa loquitur* may not be invoked unless it appears that the instrumentality causing the injury was in the exclusive control of the defendant. As a corollary, the doctrine cannot avail if the facts are such that it could be reasonably inferred that the injury was attributable to another.[83]

NEGOTIABLE INSTRUMENTS. *Collateral security.* An assignment of the proceeds of insurance policies as collateral security to a bank for all liabilities presently existing as well as those which might arise in the future is broad enough to include such notes as the assignor may thereafter execute individually or as co-maker, those which he has endorsed, and checks on which he receives money with knowledge that there were no funds in the drawee bank to pay them.[84]

Liability of bank to holder of check. A bank is not liable to the holder of a check unless and until it accepts or certifies the check, notwithstanding the fact that officers or employees of the bank verbally represented to the holder that the drawer's account was good when it fact it was not.[85]

PROCEDURE. *Appeal and error.* On appeal it is the order that is re-

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79. Atlantic Terrace Co. v. Rosen, 56 So.2d 444 (Fla. 1952).
80. Miller v. Rollings, 56 So.2d 137 (Fla. 1951).
81. Atlantic Coast Line R.R. v. Gary, 57 So.2d 10 (Fla. 1952).
82. Seaboard Air Line R.R. v. Martin, 56 So.2d 509 (Fla. 1952).
83. Schott v. Pancoast Properties, 57 So.2d 431 (Fla. 1952).
84. Silva v. Exchange Bank of Tampa, 56 So.2d 332 (Fla. 1952) (reported as 54 So.2d 370 and subsequently withdrawn by order of the court).
85. FLA. STAT. § 676.52 (1949), Gartner v. American Nat. Bank of Jacksonville, 56 So.2d 529 (Fla. 1952).

viewed and ruled on rather than the reasons assigned or set out in the order.[86]

After the entry of an order of dismissal the circuit court still has jurisdiction of the matter for six months, during which time the plaintiff may file a petition showing good cause to set aside the order and reinstate the cause. The aggrieved party should follow this procedure and an appeal of the dismissal filed before final judgment is premature.[87]

In a tort action against two defendants a judgment was had against one and a verdict of not guilty against the other. The defendant against whom judgment was had filed an appeal. Plaintiff then filed notice of joinder of the defendant who had been found not guilty at trial. This defendant objected on the ground that the plaintiff had not paid the costs in the trial court as required by statute.[88] The court held that this statute was inapplicable in the present case since the plaintiff had not incurred any costs in the court below, having won the suit.[89]

In a proceeding for a declaratory judgment pertaining to the propriety of limitations imposed by the Railroad and Public Utilities Commission in issuing a certificate of public convenience and necessity to a railroad the chancellor stated in his final decree, "It is not contended in the instant case that the statutory requisites entitling applicant to a certificate have not been met." The court held it too late to raise the question of a proper application for the certificate in the appellate briefs.[90]

Review by certiorari does not ordinarily extend to a consideration of the probative force of the conflicting testimony of two groups of witnesses.[91]

Declaration. A declaration for wrongful death under the statute[92] does not require intricate wording. Words charging the defendant with being negligently responsible for the death of the decedent are sufficient.[93]

Discovery. The defendant in a criminal prosecution stemming from an automobile accident secured the permission of the court to have an experienced court reporter transcribe the testimony. The defendant paid the reporter, who was not acting in his official capacity and was not sworn. In a subsequent action against the defendant for injuries sustained in the same accident, the plaintiffs sought an order requiring the defendant to deliver a copy of the transcript of the criminal proceedings. It was held that the plaintiffs were not entitled to receive the transcript in such circumstances.[94]

Habeas corpus. The rule that a petitioner must have exhausted his remedy in the state courts before seeking a writ of habeas corpus in the

86. Perkins v. Coral Gables, 57 So.2d 663 (Fla. 1952).
87. FLA. STAT. § 45.12 (1949), National Surety Corp. v. Grahn, 57 So.2d 457 (Fla. 1952).
88. FLA. STAT. § 59.09 (1949).
89. FLA. STAT. c. 30 (1949), Fla. Sup. Ct. Rule 13, Thomas Awning Co. v. Morgan, 57 So.2d 427 (Fla. 1952).
90. Atlantic Coast Line R.R. v. Mack, 57 So.2d 447 (Fla. 1952).
91. Schott v. Brooks, 56 So.2d 456 (Fla. 1952).
92. FLA. STAT. § 440.39 (1949).
93. Atlantic Coast Line R.R. v. Gary, 57 So.2d 10 (Fla. 1952).
94. McGee v. Cohen, 57 So.2d 658 (Fla. 1952).

federal courts is subject to an exception in unusual circumstances. Such unusual circumstances exist when a person convicted of manslaughter four years ago has twice appealed to the Florida Supreme Court,[95] been denied certiorari once by the United States Supreme Court,[96] sought a writ of habeas corpus in the state court[97] and is still awaiting final disposition before serving his sentence.[98]

New trial. When a properly instructed jury returns a verdict based on sufficient evidence to support its findings it is error for a trial judge to grant a new trial when nothing can be accomplished except to have another jury review the cause. "Courts are not permitted to pit their judgment against that of a jury sworn to try the cause."[99]

Once a trial judge has determined that a verdict is contrary to the weight of evidence he is under a duty to order a new trial.[100]

Remittitur. A successful plaintiff who files a remittitur rather than face a new trial cannot be heard to complain of error with reference to the order to remit on appeal of the defendant's motion for a new trial. In the words of the court, he cannot "have his cake and eat it too."[101]

Sham plea. A plea of no consideration in a suit on a promissory note may properly be stricken as a sham if the defendant fails to answer the plaintiff's affidavit with a counter-affidavit.[102]

Summary judgment. When the record fails to reveal a genuine issue as to any material fact a summary judgment is correctly entered.[103]

Vacation or modification of judgment by trial court. "All judgments, decrees or other orders of the Court, however conclusive their character, are under the control of the Court which pronounced them *during the term* at which they are rendered, or entered of record, and they may be set aside, vacated, modified, or annulled by that Court. . . . After the term has ended all final judgments and decrees of the Court pass beyond its control, unless steps are taken during the term, by motion or otherwise, to set aside, modify or correct them. Orders, decrees or judgments made through fraud, collusion, deceit or mistake may be opened or vacated or modified at any time on the proper showing made by the parties injured."[104]

Waiver of jury trial. A motion to strike a portion of the defendant's answer coupled with a motion for summary judgment is tantamount to a waiver of the movant's request for a jury trial in the initial pleadings.[105]

95. State v. Bacom, 159 Fla. 54, 30 So.2d 744 (1947); Bacom v. State, 39 So.2d 794 (Fla. 1949).
96. Bacom v. State, 338 U.S. 835 (1949).
97. Bacom v. Sullivan, 51 So.2d 189 (Fla. 1950).
98. Bacom v. Sullivan, 194 F.2d 166 (5th Cir. 1952).
99. Poindexter v. Seaboard Air Line R.R. 56 So.2d 905 (Fla. 1952).
100. Richbourg v. Hilton, 56 So.2d 539 (Fla. 1952).
101. Seaboard Air Line R.R. v. Martin, 56 So.2d 509 (Fla. 1952).
102. Sarasota Kennel Club, Inc. v. Shea, 56 So.2d 505 (Fla. 1952).
103. Goodman v. Miami Beach Ry. Co., 57 So.2d 445 (Fla. 1952).
104. FLA. STAT. §§ 26.36, 50.10 (1949), Perrin v. Enos, 56 So.2d 920 (Fla. 1952).
105. Silva v. Exchange Nat. Bank of Tampa, 56 So.2d 332 (Fla. 1952) (reported as 54 So.2d 370 and subsequently withdrawn by order of the court).

Writ of prohibition. An appeal and not a writ of prohibition is the proper way to review errors of a circuit court. A petition for a writ of prohibition should affirmatively show either a lack of jurisdiction in an inferior court or that the inferior court exceeded its jurisdiction.[106]

PUBLIC HEALTH. *Tubercular persons.* The statute requiring compulsory isolation and hospitalization of tubercular persons[107] is a proper exercise of police power and is not violative of constitutional rights. The fact that the statute does not provide for any definite or mandatory form of release does not invalidate it. When the person hospitalized feels that he has been cured or the disease is no longer infectious the courts will be open to him to obtain his release.[108]

REAL PROPERTY. *Easement of necessity.* The right to a way of necessity is founded upon an implied grant from a common grantor in the chain of title. No such implication arises from conveyances by the State. The statutory exception to this rule allows a way of necessity only to landlocked property used for home, agriculture or stock raising but for no other purposes.[109]

Loss of homestead classification. A man married and brought his bride to live in his father's home. Subsequently the son actively assumed the role of head of the family domiciled in that home. The court held that the property lost its homestead character under these circumstances even though the father-owner continued to live on the property.[110]

STATUTE OF FRAUDS. *Memorandum.* A letter from a father to his daughter promising to convey a half interest in his property to her if she would come to live with him is not a sufficient memorandum to satisfy the Statute of Frauds.[111]

Part performance. Taking possession of land in addition to the payment of a part or all of the consideration is such part performance as will take an oral contract for the sale of the land out of the Statute of Frauds.[112]

STATUTES. *Plurality of subjects.* A legislative act creating a court of record and abolishing a county court does not contain two different matters so disconnected and dissimilar as to constitute an unconstitutional plurality of subjects.[113]

TAXATION. *Drainage districts.* "Lack of benefits cannot form a defense to or the means of attack on tax liability to a drainage district under a statute providing that the taxes are for a special benefit to the lands involved

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106. State *ex rel.* Dunscombe v. Smith, 56 So.2d 536 (Fla. 1952).
107. FLA. STAT. § 392.23(2) (1949).
108. Moore v. Draper, 57 So.2d 648 (Fla. 1952).
109. Guess v. Azar, 57 So.2d 443 (Fla. 1952).
110. Brady v. Brady, 55 So.2d 907 (Fla. 1950), *aff'd on rehearing*, Dec. 4, 1951.
111. Cottages, Miami Beach, Inc., v. Wegman, 57 So.2d 439 (Fla. 1952).
112. *Ibid.*
113. FLA. CONST. Art. III, § 16, Hanson v. State, 56 So.2d 129 (Fla. 1952).

unless here is a clear showing of abuse of discretion on the part of the Legislature."[114]

Improvement assessments. The court had formerly held that "lands which were benefitted or were reasonably susceptible to benefits by their inclusion within the city limits and by the expansion program for which the bond funds were to be expended" might in equity be "assessed upon a just and uniform basis for their proportionate share of the debt."[115] In clarification of this rule the court said: "By this we meant, and now hold, that such lands should be assessed for taxes in accordance with the statutory law and constitutional provisions of this State upon the subject of taxation and in the same manner that all other real property liable to such tax is taxed."[116]

There is a presumption in favor of the validity of improvement assessments by a municipality and a party attacking the assessments must sustain the burden of proving that no benefits would accrue to the property assessed.[117]

Special school tax districts. The legislature may create elementary or high school tax areas for the purpose of imposing a tax for public school purposes, so long as the tax imposed, when added to that already imposed by existing special school districts, does not exceed the constitutional limitation of ten mills.[118]

State property. "A state clearly has the right, by positive legislative enactment, to declare that its property may be assessed for local improvements, and a constitutional exemption of the property of the state from 'taxation'[119] does not prevent such a grant." A subsequent act providing that no taxes shall be levied on any land comprising part of the State School Fund[120] is ineffectual to overcome the previous grant of authority to levy special assessments for improvements.[121]

TORTS. *Assault.* Allegations that plaintiff as discharged from employment and threatened with forcible eviction from the premises are insufficient to state a cause of action for assault.[122]

Liability of county hospital to paying patient. As to paying patients a county hospital is operated in a proprietary capacity. The paying patient is entitled to the same protection and the same redress for wrongs that he would receive in a privately owned hospital. He may not be divested of this

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114. State *ex rel.* Board of Sup'rs of S. Fla. Conservancy Dist. v. Warren, 57 So.2d 337 (Fla. 1952).
115. Town of Largo v. Caraher, 44 So.2d 84 (Fla. 1950).
116. Town of Howey in the Hills v. Graessle, 57 So.2d 422 (Fla. 1952).
117. Rosche v. Hollywood, 55 So.2d 509 (Fla. 1952).
118. FLA. CONST. Art. XII, § 10, Fla. Laws 1951, c. 26775, Smith v. Board of Pub. Inst. of Brevard County, 56 So.2d 713 (Fla. 1952).
119. FLA. CONST. Art. XVI, § 16.
120. Fla. Laws 1949, c. 25186.
121. State *ex rel.* Board of Sup'rs of S. Fla. Conservancy Dist. v. Warren, 57 So.2d 337 (Fla. 1952).
122. Gelhaus v. Eastern Air Lines, Inc., 194 F.2d 774 (5th Cir. 1952).

right by an act[123] immunizing the hospital from liability for the acts of its agents and employees.[124]

Malicious prosecution. False testimony given by the defendant as prosecuting witness in a criminal action against the plaintiff is sufficient to justify a jury finding of the necessary malice to support a suit for malicious prosecution.[125]

Statutory liability for dog bite. An easily readable sign bearing the words "Beware of Dogs" suffices to relieve the owner of a dog from liability to a party bitten on the owner's premises, although the statute requires the words "Bad Dog."[126]

TRUSTS. *Constructive trust.* A person obtaining title to land by fraud cannot be placed in a better position than he would have been had the fraud not been committed. Therefore, once a fraud is established, it is error to declare a constructive trust of only half the land in favor of the party defrauded.[127]

Cy pres. In applying the doctrine of *cy pres* a public body such as a county board of public instruction may be properly submitted as the beneficiary of a charitable trust created for the purpose of providing adequate vocational education to the Negroes of the State.[128]

Establishment of resulting trust by parol evidence. "When a resulting trust is sought to be established by parol evidence, the burden rests upon the person asserting the existence of the trust to remove every reasonable doubt as to its existence by clear, strong and unequivocal evidence."[129]

USURY. *Criminal and civil.* It is the rule that if a note contains an acceleration clause of which the lender takes advantage the bonus or excess will be prorated only over the period of time which the lender has elected to allow the obligation to run.[130] However, this rule will not be applied to make a note, which was only civilly usurious in its inception, criminally usurious when the lender sues only for the amount lent and not for the bonus.[131]

WILLS. *Effect of divorce.* A separation agreement between husband and wife followed by a divorce does not impliedly revoke a provision in her favor in the husband's will.[132]

Petition for distribution. Petitioners, one of whom was a minor represented by his guardian, petitioned to have executed an agreed plan of distribution of an intestate estate. The court held that the agreed plan of

123. Fla. Laws 1945, c. 23547.
124. Suwannee County Hospital Corp. v. Golden, 56 So.2d 911 (Fla. 1952).
125. Maiborne v. Kuntz, 56 So.2d 720 (Fla. 1952).
126. FLA. STAT. § 767.04 (1949), Romfh v. Berman, 56 So.2d 127 (Fla. 1952).
127. Allen v. Tatham, 56 So.2d 337 (Fla. 1952).
128. Fenske v. Coddington, 57 So.2d 452 (Fla. 1952).
129. Pringle v. Pringle, 57 So.2d 429 (Fla. 1952).
130. Smith v. Midcoast Inv. Co., 127 Fla. 455, 173 So. 348 (1937).
131. FLA. STAT. §§ 687.03, 687.04, 687.07, Ayvas v. Green, 57 So.2d 30 (Fla. 1952).
132. Davis v. Davis, 57 So.2d 8 (Fla. 1952).

distribution could not be approved since it was not obviously serving the best interests of the minor child.[133]

Presumption of revocation. There is a rebuttable presumption that a testator revoked his will if it was known to have been in his possession and cannot be found subsequent to his death.[134]

WORKMEN'S COMPENSATION. *Mental injury caused by fright.* An employee was involved in a traffic accident in the course of his employment and sought to recover workmen's compensation. His only provable injury is a mental or nervous condition. The court held that there was no exception to the statute which precludes recovery for a mental or nervous injury due to fright or excitement only, as distinguished from a similar condition brought on by trauma.[135]

Reopening of case. Evidence that does nothing more than add to or controvert that already taken is not sufficient to reopen a case for the purpose of securing additional workmen's compensation. It must reveal new or changed developments that have a casual relationship to the injury to warrant a reopening of the case.[136]

Statute of Limitations. The legislature expressed only one exception to the two year Statute of Limitations in the Florida Workmen's Compensation Act.[137] The maxim, *expressio unius est exclusio alterius* ("express mention of one thing is the exclusion of another"), is applicable and no other exceptions will be implied.[138]

Zoning. Conflict with statute. If two city zoning ordinances, when construed together, can only be interpreted to mean that but one liquor license may be issued within an incorporated area, they are void as being in conflict with the statute prohibiting license limitations which prevent the issuance of less than two such licenses in any incorporated area.[139]

133. *In re* Beach's Estate, 57 So.2d 659 (Fla. 1952).
134. *In re* Washington's Estate, 56 So.2d 545 (Fla. 1952).
135. FLA. STAT. § 440.02(19) (1949), City Ice & Fuel Division v. Smith, 56 So.2d 329 (Fla. 1952).
136. McDonough v. Versailles Hotel, 57 So.2d 16 (Fla. 1952); Sonny Boy's Fruit Co. v. Compton, 46 So.2d 17 (Fla. 1951).
137. FLA. STAT. § 440.19(1) (1949).
138. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952).
139. FLA. STAT. § 561.20(1) (1949), Downsbrough v. Town of Lake Maitland, 57 So.2d 21 (Fla. 1952).